

Before the  
Federal communications Commission  
Washington, D.C. 20554

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In the Matter of )

Petition of Cavalier Telephone, LLC )

Pursuant to Section 252(e)(5) of the )  
Communications Act for Preemption )  
of the Jurisdiction of the Virginia State )  
Corporation Commission Regarding )  
Interconnection Disputes with Verizon )  
Virginia Inc. and far Arbitration )

WC Docket No. 02-

359

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**PETITION OF CAVALIER TELPEPHONE. LLC**

Cavalier Telephone, LLC ("Cavalier"), by counsel, and pursuant to § 252(e) of the Communications Act, as amended ("the Act"), 47 U.S.C. § 252(e), and § 51.803 of the rules of the Federal Communications Commission ("the Commission"), 47 C.F.R. § 51.803, respectfully petitions the Commission to preempt the jurisdiction of the Virginia State Corporation Commission ("the SCC") to arbitrate an interconnection agreement with Verizon Virginia Inc. ("Verizon"). This petition stems from the SCC's refusal to act on Cavalier's request for arbitration of an interconnection agreement with Verizon pursuant to § 252(b) of the Act. Because the SCC refused to act, Cavalier asks the Commission to assume jurisdiction over, and arbitrate, this matter.

**1. Background**

On January 13, 1999, Cavalier entered into an interconnection agreement in Virginia with Verizon's predecessor in interest, Bell Atlantic-Virginia, Inc. ("BA"), opting into the agreement between BA and MCI Metro Access Transmission Services of

Virginia Inc. ("MCImetro"). The SCC approved the agreement on June 21, 1999, in Case No. PUC990048.

The original MCImetro agreement expired on July 17, 2000, but its terms continue in effect month-to-month until a successor agreement becomes effective. (See Interconnection Agreement, Part A, ¶ 31, on file in SCC Case No. PUC990048.) As described in the attached affidavit of Martin W. Clift, Jr., Cavalier formally requested negotiations pursuant to § 252 of the Act on March 6, 2002. On August 14, 2002, after several months of unsuccessful negotiations, Cavalier filed with the SCC a petition for arbitration of nineteen unresolved issues with Verizon. The SCC docketed the case as No PUC-2002-00171. Verizon filed its response on September 9, 2002, raising six additional issues, and Cavalier filed its response to these six new issues on October 4, 2002.

On October 11, 2002, the SCC issued an Order of Dismissal in Case No. PUC-2002-00171, based on the following reasoning:

Cavalier brings its Arbitration Petition pursuant to 47 U.S.C. §§ 251 and 252 and the effective rules implementing these provisions of the Act, issued by the Federal Communications Commission ("FCC") in its Local Competition Order. Cavalier also relies upon this Commission's Procedural Rules for Implementing §§ 251 and 252 of the Act (20 VAC 5-419-10 et seq.). While 20 VAC 5-400-180F 6 provides for our "arbitration" of contested interconnection matters, Cavalier submits its Arbitration Petition for consideration according to the Act and not simply under state law. Cavalier recognizes in its Arbitration Petition that the Commission may choose to decline to exercise jurisdiction over this matter and instead refer it to the FCC. Cavalier states that it does not oppose such consideration of the Arbitration Petition by the FCC.

The Commission has declined to waive sovereign immunity under the Eleventh Amendment to the Constitution of the United States. We have avoided waiver of our immunity and explained our reasons in the Commission's Order of Dismissal of the Application of AT&T Communications of Virginia, Inc., et al.. For Arbitration with Verizon Virginia, Case No. PUC-2000-00282, issued

December 20, 2000 ("AT&T Dismissal Order"). We repeat below our holding in the AT&T Dismissal Order in which we declined to exercise jurisdiction.

As stated in our November 22, 2000, Order, until the issue of the Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers. (AT&T Dismissal Order, p. 2.)

In Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. \_\_\_, 70 USLW 4432 (2002) ("Verizon Md. v. PSC of Md."), the Supreme Court held that the federal courts have jurisdiction under 28 USC § 1331 to review state commission orders for compliance with the Act or with an FCC ruling issued thereunder and that suit against individual members of the state commission may proceed under the doctrine of Ex Parte Young, 209 U.S. 123 (1908). However, Verizon Md. v. PSC of Md. did not disclose whether state commissions waive their sovereign immunity by participating in § 252 matters nor whether Congress effectively divested the states of their Eleventh Amendment immunity from suit under § 252 of the Act.

The Commission finds that the Arbitration Petition of Cavalier should be dismissed so that the parties may proceed before the FCC. It shall be the responsibility of the parties to serve copies of all pleadings filed herein on the FCC.

Order of Dismissal, Case No. PUC-2002-00171, at pp. 2-5 (footnotes omitted).

The SCC has thus refused to arbitrate using the federally mandated framework, and Cavalier files this Petition to pursue the rights granted to it by the Act.

#### 11. The SCC Failed to Act

The Commission's authority to assert jurisdiction under section 252(e)(5) of the Act is premised on a finding that a state commission has "failed to act" in "any proceeding or other matter under [§ 252]." As it has done in several other cases, the SCC has unequivocally refused to arbitrate a revised agreement between Cavalier and Verizon in accordance with the mandates set forth in §§ 251 and 252 of the Act. The SCC's

refusal to act could be no more plain or evident—a state commission’s refusal to arbitrate an agreement under § 252 constitutes a failure to act within the meaning of § 252(e)(5).

In the past, the SCC has allowed parties the opportunity to proceed with arbitration solely under Virginia law.’ In this case, however, the SCC instead clearly ordered that it “will not arbitrate the interconnection issues.” (Order of Dismissal at p. 5.) This plain statement is a plain and simple failure to act that triggers the Commission’s obligation to assume jurisdiction of this matter pursuant to § 252(e)(5).

### III. The Commission Should Preempt the SCC’s Jurisdiction.

Because of the SCC’s outright refusal to proceed with arbitration under federal law, the grant of this Petition would be consistent with the requirements of §§ 251 and 252(e)(5), as well as this Commission’s decisions in a quartet of decisions involving WorldCom, Starpower, Cox, and AT&T.<sup>2</sup>

The Act is clear—§ 252(e)(5) requires the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which the state commission “fails to act to carry out its responsibility” under § 252. Specifically, § 252(e)(5) provides that:

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<sup>1</sup> See, e.g., Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to § 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc., CC Docket No. 00-218, FCC 01-20 (rel. Jan. 19, 2001), at p. 2 (discussing SCC’s Sept. 13, 2000 Order in case brought by WorldCom, Inc.) (hereinafter cited as WorldCom).

<sup>2</sup> See WorldCom, supra; Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to § 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, FCC 00-216 (rel. June 14, 2000); Cox Virginia Telecom, Inc., Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to § 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-126, DA 00-2118 (rel. Sept. 18, 2000); Petition of AT&T Communications of Virginia, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to § 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-251, DA 01-198 (rel. Jan. 26, 2001).

IF a State commission fails to act to **carry** out its **responsibility** under this **section in any proceeding or other matter under this section**, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter **within** 90 days **after** being **notified** (or taking notice) of such failure, **and** shall **assume** the responsibility of the State commission under this section with respect to the proceeding or matter **and act** for the **State Commission**. 47 U.S.C. § 252(e)(5) (emphasis added).

The Commission **has** expressly acknowledged its authority to preempt a state's jurisdiction in these instances.<sup>3</sup>

The language of § 252(e)(6) of the Act further supports grant of this Petition.

There, Congress unequivocally stated that "[i]n a case where a State fails to act as described in [section 252(e)(5)], 'the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act.'" 47 U.S.C. § 252(e)(6) (emphasis added). Congress thus directed this Commission to serve as an alternative forum for mediation, arbitration and enforcement proceedings if a state fails to **carry** out its responsibilities under § 252.

#### IV. The Procedures Established in AT&T/Cox/WorldCom Should Be Followed

The Commission **has** already adopted procedures in arbitrations with a genesis similar to that of Cavalier's arbitration request in this Petition. See In the Matter of Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended, FCC 01-21, 16 FCC Rcd 6231 (rel. Jan. 19, 2001); Procedures Established for Arbitration of Interconnection Agreements Between

<sup>3</sup> Implementing the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, ¶ 1285 (1996) (subsequent history omitted). The Commission **has** also acknowledged its authority to enforce an agreement in specific instances where the state commission fails to act. See Starpower, supra, at ¶ 7; Cox, supra, at ¶ 4.

Verizon and AT&T, Cox. and WorldCom, CC Docket Nos. 00-218, 00-249, 00-251, DA 01-270 (Feb. 1, 2001).

Cavalier respectfully requests that the ~~Commission~~ follow ~~these~~ same procedures, and adopt a ~~similar~~ procedural schedule, in proceeding ~~forward~~ with ~~its~~ preemption of the SCC's ~~jurisdiction to~~ arbitrate Cavalier's interconnection agreement with Verizon.


#### V. Conclusion

For ~~the reasons~~ stated above, petitioner, Cavalier Telephone, LLC, respectfully requests that the Federal Communications Commission preempt the jurisdiction of the Virginia State ~~Corporation~~ Commission to arbitrate Cavalier's interconnection agreement with ~~Verizon~~ Virginia Inc., because of the Virginia State Corporation Commission's failure to act on Cavalier's request for arbitration. Cavalier ~~further~~ respectfully requests that ~~this~~ Commission grant Cavalier ~~such~~ other relief to which it may be legally or equitably entitled.

Dated: November 7, 2002.

Respectfully submitted,

CAVALIER TELEPHONE, LLC



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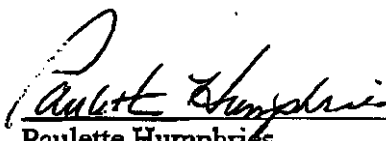
**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of November, 2002, I caused a copy of the foregoing Petition, together with the accompanying Affidavit of Martin W. Clift, Jr., and the attachments to that Affidavit, to be served on the following by overnight delivery:

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Vice President and ~~General~~ Counsel  
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William H. Chambliss, Esquire  
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